IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/02/2003

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION NO.4046 OF 2003
AND W.P.NOS.4339,4427 to 4496,4520,4575, 4602,4632, 4703,4708,4744 to 4761,4767,4785,4808 to 4820, 4851,4805,4917 to 4922,4943,4961 to 4972, 4980 to 4991, 4996 to 5023, 5025, 5027, 5035 to 5041, 5071,5077,5083, 5090,5092,5107,5118 to 5121,5130 to 5146, 5158 to 5188, 5190, 5191, 5203 to 5205, 5210,5213,5226,5229 to 5234, 5236,5239,5240 ,5347 to 5380, 5396,5420,5423,5425, 5426,5257,5258,5268,5271,5272 , 5275 to 5280,5286,5289, 5305, 5322 to 5325,5336 to 5346, 5501,5502, 5554, 5561 to 5566, 5612,5658,5676,5682, 5688 and 5753 OF 2003

K. Muthusamy,
4/554, Palladam Main Road,
Veerapandi Village Panchayat,
Tiruppur Taluk,
Coimbatore District. .. Petitioner in WP.4046/2003

Vs.

1. The Government of Tamilnadu
rep. by its Secretary,
Prohibition & Excise Department,
Fort St. George,
Chennai 600 009.

2. The Commissioner,
Prohibition & Excise Department,
Chepauk, Chennai 600 005. .. Respondents in WP.4046/2003

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorari as stated therein.

For Petitioners : Mr.K. Vijayan,
Senior Counsel for
M/s. La Law

Mrs. Nalini Chidambaram,
Senior Counsel for
Mr.L.S.M. Hasan Fizal

Mr.K. Selvaraj

Mr.R. Subramanian

Mr.B. Sundaramoorthy

Mr.M.R. Narasimhan

Mr.AR.L. Sundaresan

For Respondents : Mr.R. Muthukumarasamy
Addl. Advocate General
Assisted by
Mr.K. Mahendran
Special Govt. Pleader

:J U D G M E N T

The petitioners are the licensees in respect of various retail IMFL shops in different districts. They have been allotted such shops on the basis of their application made under Rule 13 of the Tamil Nadu Liquor (Retail Vending) Rules, 1989 (hereinafter called "the Rules"). Under the impugned letters dated 1.2.2003 and 4.2.2003, the Government and the Commissioner respectively have issued instructions to settle the IMFL shops, which have not been settled with anybody, with various Co-operative Societies and the Civil Supplies Corporation.

2. The relevant portion of the letter (Ms) No.42 dated 1.2.2003 issued by the Secretary to the Government to the Commissioner and others is extracted hereunder:

" . . . I am directed to state that the Government have examined the question of licensing of the 2,364 shops remaining unsold in the State. The Government consider that the revenue to the Government can be fully realised, only if the shops are allotted to the Cooperative societies and the Tamil Nadu Civil Supplies Corporation. The Government after consultation with the Registrar of Co-operative Societies and the Chairman & Managing Director, Tamil Nadu Civil Supplies Corporation, under the powers vested with them under proviso to Rule 3 of the Tamil Nadu Liquor (Retail Vending) Rules 1989, have decided to permit the Commissioner of Prohibition and Excise to direct the licensing authorities concerned to grant the privilege of retail vending of Indian Made Foreign Liquor in a total of 1500 shops, i.e. 1,300 shops to the Co-operative Societies and 200 shops to the Tamil Nadu Civil Supplies Corporation on nomination basis.

2. Accordingly the Government issues the following guidelines: -

(1) For the shops so allotted on nomination basis to Co-operatives/Tamil Nadu Civil Supplies Corporation, the proportionate privilege amount from the date of grant of licence should be collected. The proportionate amount shall be collected in monthly instalments.

(2) In so far as the shops notified in Panchayat areas are concerned, wherever the Co-operatives request a change in location, the Collectors concerned are requested to take necessary action to renotify such of those shops for which re-location is considered to be necessary. While considering such relocation, only new areas where there is no other IMFL shop and which are also suitable for location of IMFL shops as per other conditions in the Tamil Nadu Liquor (Retail Vending) Rules, 1989 alone should be selected. The Commissioner of Prohibition and Excise is requested to issue necessary circular instructions for this purpose.

(3) As regards working capital and privilege amount for running the shop, the Registrar of Co-operative Societies is requested to take necessary action to arrange cash credit from the Central Co-operative Banks concerned, wherever found necessary. The Chairman & Managing Director, Tamil Nadu Civil Supplies Corporation may take suitable action in respect of shops taken by the Tamil Nadu Civil Supplies Corporation.

(4) The Managing Director, Tamil Nadu State Marketing Corporation Limited is requested to make necessary arrangements to grant working capital loan in respect of the shops to be located in Dharmapuri, Sivaganga and Tirunelveli districts, if requested by the Registrar of Co-operative Societies. The loan shall bear interest at current bank lending rate + 1% and subject to necessary hypothecation of assets for the loan amount.

(5) As a special concession to the shops to be run by the Cooperative Societies and Tamil Nadu Civil Supplies Corporation, a cash discount, equal to the interest on one month cash credit shall also be allowed by the Tamil Nadu State Marketing Corporation Limited. The working arrangements for this purpose may be finalised by the Managing Director, Tamil Nadu State Marketing Corporation Limited.

(6) The Registrar of Co-operative Societies and the Chairman & Managing Director, Tamil Nadu Civil Supplies Corporation are requested to take all necessary steps to ensure that the shops allotted to the Co-operative Societies and the Tamil Nadu Civil Supplies Corporation, as the case may be, start functioning from the 15th February, 2003.

(7) The Commissioner of Prohibition and Excise is requested to take necessary action to furnish the district-wise & notified area-wise details of unsold shops to the Registrar of Co-operative Societies and the Chairman & Managing Director, Tamil Nadu Civil Supplies Corporation immediately.

3. The Commissioner of Prohibition & Excise / the Registrar of Cooperative Societies and the Chairman & Managing Director, Tamil Nadu Civil Supplies Corporation / Managing Director, Tamil Nadu State Marketing Corporation Limited are requested to issue necessary instructions to the district level officers of the respective departments and to co-ordinate with each other to implement the above decisions.
. . ."

3. The relevant portion of Lr.No.P & E IX (1)/16131/2002 dated 4.2.2

003 issued by the Commissioner is extracted hereunder: -

" I wish to state that in their orders first cited, the Government have fixed the total No. of shops at 7000 for the whole State for grant of Indian Made Foreign Liquor retail licences for the year 2002-200 3. It is seen that as on 10.1.03, even after having conducted 5 lots, as against the total No. of 7000 shops notified for the State as a whole for the year 2002-2003 only 4636 shops have been sold leaving a balance of 2364 unsold shops.

2. It is considered that for augmenting excise revenue to Government it is absolutely necessary to sale more number of shops so that the Government gets additional State Excise privilege amount towards the sale of Indian Made Foreign Liquor Retail shops and consequential revenue by way duties and taxes on the increase off-take of IMFS due to the additional shops.

3. As per rule 3 of Tamil Nadu Liquor (Retail Vending) Rules, 1989, where the Commissioner considers it necessary, he may direct the licensing authority to grant on payment of such sum or fee or both as may be fixed by the Commissioner, the privilege in relation to not exceeding forty percentum of maximum number of Retail Vending shops including shops for which eligible applications are not received, permitted by the Government and distributed as far as possible among the various districts by nomination to the TASMAC or the Tamil Nadu Civil Supplies Corporation or Co-operative Societies.

4. In their letter Ms.No.42 P&E (VI) Department, 1.2.2003, the Government have permitted the Commissioner of Prohibition and Excise to direct the licensing authorities concerned to grant the privilege of Retail Vending of Indian Made Foreign Liquor in a total of 1500 shops, i.e. 1300 shops to the Co-operative Societies and 200 shops to the Tamil Nadu Civil Supplies Corporation on nomination basis.

5. The grant of privilege of retail Indian Made Foreign Spirit to the Co-operatives and Tamil Nadu Civil Supplies Corporation relating to payment of privilege fee etc. will be on the following guidelines.

i) For the shops so allotted on nomination basis to Co-operatives/Tamil Nadu Civil Supplies Corporation, the proportionate privilege amount from the date of grant of licence should be collected. The proportionate amount shall be collected in 7 monthly instalments.

ii) For the issue of Bar licences, wherever applied for the proportionate privilege amount for the respective category from the date of grant of licence should be collected. The proportionate amount shall be collected in 7 monthly instalments.

iii) The Security Deposit of Rupees One lakh for Indian Made Foreign Spirit Retail Shop and Security Deposit of Rs.50,000/- for Bar licence wherever applied shall also be collected in instalments along with the privilege amount.

iv) In so far as the shops notified in Panchayat areas are concerned, wherever the Co-operatives request a change in location, the Collectors concerned are authorized to take necessary action to renotify such of those shops for which re-location is considered to be necessary. While considering such relocation only new areas where there is no other Indian Made Foreign Liquor shop which are also suitable for location of Indian Made Foreign Liquor shops as per other conditions in Tamil Nadu Liquor (Retail Vending) Rules, 1989, alone should be selected.

v) All shops are to be made operational by 15.2.2003. .
. ."

4. The petitioners have challenged the aforesaid instructions as well as the validity of Rule 3 proviso mainly on the ground that allotment of unsold IMFL retail shops to the Co-operative Societies and the Tamil Nadu Civil Supplies Corporation by granting some concessions is opposed to public policy and the Directive Principles of State Policy as contained in Article 47 of the Constitution of India and violative of right of equality under Article 14 of the Constitution of India, being arbitrary and discriminatory and further on the ground that the instructions are contrary to the provisions contained in Tamil Nadu Prohibition Act (hereinafter called as "the Act") and the Rules.

5. A counter affidavit has been filed on behalf of the respondents in one Writ Petition, namely W.P.No.4046 of 2003, which has been taken as the common counter in all the cases. In the said counter, allegations have been denied and the letters issued by the respondents have been justified.

6. Before considering the contentions raised by various learned counsels for the petitioners and the counter contentions raised on behalf of the respondents, it is necessary to extract the relevant provisions contained in the Act and the Rules.
Section 17-D provides:

17-D. Payment of a sum in consideration of the grant of any exclusive or other privilege or fee on licences for manufacture or sale. - The State Government may, by rules, levy a sum or fee or both in consideration of the grant of any exclusive or other privilege under section 17-C and also a fee on licences granted under section 17-C.

Section 20(d) is as follows:

20. Permits and licences.- The State Government or any officer empowered by them in this behalf may issue, -
(a). . .
(b). . .
(c). . .
(d) licences to any person to possess liquor and issue it to persons or institutions who hold permits or licences under this Act or who have been exempted under this Act from so much of the provisions of section 4, sub section (1), clauses (a), (aa), (aaa) or (j), as relates to the possession, consumption or buying liquor.
Section 20-B is as follows:

" 20-B. Co-operative societies to be given preference.- Where any co-operative society registered or deemed to have been registered under any law in force for the time being, makes an application for the grant of a licence under clause (d) of section 20, the authority competent to grant such licence shall, in granting such licence, give preference to such co-operative society over every other applicant.

Section 21 is as follows :

"21. Form and conditions of licences and permits.-

Every licence or permit granted under sections 6-A,17-B, 17-C, 18, 1 9 or 20 shall -

(1) be granted on payment of such fees, if any, for such period, and subject to such restrictions and limitations and on such terms and conditions including -

(a) the condition for deposit of such sum as may be prescribed as security for the observance of the terms and conditions of any such licence or permit;

(b) the conditions for forfeiture of the whole or part of the sum so deposited for contravention of any term or condition on which the licence or permit has been granted.

(c) The condition for the replacement of the sum so forfeited within such time as may be prescribed; and

(2) be in such form and contain such particulars as the State Government may direct either generally or in any particular case.

Rule 2(v) "privilege amount" means the amount determined by the Commissioner for a shop for the grant of privilege based on the guidelines issued by the Government;

" Rule 3. Grant of privilege.- The privilege shall be granted to any person in accordance with the provisions of these rules :

Provided that, where the Commissioner considers it necessary, he may direct the licensing authority to grant, on payment of such sum or fee or both as may be fixed by the Commissioner, the privilege in relation to not exceeding forty per centum of the maximum number of retail vending shops including shops for which eligible applications are not received, permitted by the Government and distributed as far as possible among the various, districts by nomination to the Tamil Nadu State Marketing Corporation or the Tamil Nadu Civil Supplies Corporation or Co-operative Societies. The Tamil Nadu State Marketing Corporation or the Co-operative Society interested in the grant of the privilege may apply to the licensing authority in Form IV together with an affidavit in Form II:

Provided further that the licensing authority shall, before nominating any Co-operative Society for the grant of the privilege, cause such verification as it may deem necessary to be made and satisfy itself as to the suitability of that society for the grant of the privilege."

Rule 4. Fixation of number of shops.-
(1) The maximum number of shops to be established in the State shall be determined by the Government.

(2) Subject to the maximum number of shops fixed under sub-rule(1), the Commissioner, shall, in consultation with the Collector and after taking into account the needs of the district, fix the number of shops for each district.

(3) The Collector shall, taking into account the interests of the revenue of the State, notify the area in the district and shall, taking into account the need of such area, determine the number of shops in such area.

Provided that the Collector may with the permission of the Government increase or reduce the number of shops in the area taking into account the subsequent need and the prevailing conditions including demand in the area.

Rule 13. Application for the grant of privilege and licence.- (1) Any person interested in getting the privilege for retail vending of Indian Made Foreign Liquor in an area shall make an application in Form VI to the licensing authority along with the following :-

(i) A Demand Draft for an amount equivalent to one half of the privilege amount fixed for the shop, drawn on a nationalised bank favouring the Collector of the district.

(ii A Demand Draft for Rs.500/- (Rupees five hundred only) towards application fee drawn on a nationalised bank favouring the Collector of the district :
. . .

Rule 13-A. Grant of licence to grantee by nomination.- Upon the

nomination under the first proviso to sub-rule (1) of rule 3 for the grant of privilege, the nominee shall furnish a certificate in Form III and remit-

(a) an application fee of Rs.500/- (Rupees five hundred only);

(b) the sum or fee or both fixed by the Commissioner;

(c) the licence fee of Rs.5,000/- (Rupees five thousand only); and

(d) a security deposit of Rs.1,00,000/- (Rupees one lakh only) and obtain a licence in Form VII which shall be valid for a period of one year.

Rule 17. Shifting of shop.- (1) No licensee shall change the premises in which he carries on business under his licence except with the previous permission of the licensing Authority :

Provided that no permission to shift the business place outside the area shall be granted.

(2) If a licensee intends to change the premises in which he carries on business under his licence, he shall apply to the licensing authority in Form VIII-A together with an application fee of Rs.1,000/- (Rupees one thousand only)

7. One of the main contentions raised by several learned counsels relates to the policy of the Government in encouraging business in liquor by various Co-operative Societies. It has been submitted that under Preamble of the Co-operative Societies Act as well as under Section 4 of such Act, it is the avowed intention of the Legislature to strengthen the co-operative movement. By no stretch of imagination it can be said that the Legislature has intended to encourage the Cooperative Societies to carry on business in liquor trade. At any rate, in view of the Directive Principles of State Policy contained in Article 47 of the Constitution of India, the State should not encourage the Co-operative Societies in carrying on liquor business.

8. If a moralistic stand is taken, the policy of the Government in encouraging trade in liquor by the Co-operative Societies may appear to be rather incongruous. However, once the State Government decides not to impose policy of prohibition and permits trade in liquor by individuals, no fault can be attributed to the Government in permitting or even encouraging the Co-operative Societies to undertake such business. Since the petitioners themselves are the beneficiaries of policy of the Government in not imposing the policy of prohibition and they are being permitted to trade in liquor, criticism by such beneficiaries of the Government policy in the matter relating to undertaking of such business by the Co-operative Societies does not appear to be justified. It is no doubt true that Article 47 enjoins upon the State Government to effect policy of prohibition, but since such prohibition policy has not been adopted by the State Government,

nay, by most of the State Governments, it would be futile to contend that the provisions contained in the statute or the Rules permitting the Cooperative Societies to carry on business in liquor should be struck down as opposed to public policy.

9. The next contention relates to excessive delegation of power under Rule 3 of the Rules. In this context it is contended that two letters in question have also conferred unbridled and unguided power in the matter of allotment on nomination basis to the Co-operative Societies. Even though such a contention appears to be attractive on the face of it, on a closer scrutiny, the provisions contained in the Act and the Rules make it amply clear that neither Rule 3 nor two letters cannot said to be suffering from the vice of excessive delegation.

10. In Rule 3 itself it has been made clear that grant of privilege to the Tamil Nadu State Marketing Corporation or the Tamil Nadu Civil Supplies Corporation or Co-operative Societies shall not exceed forty per centum of the maximum number of retail vending shops. Rule 3 also makes it amply clear that before nominating the Co-operative Societies for the grant of privilege, the licensing authority is empowered to cause such verification, as he may deem necessary, so as to satisfy the suitability of the Society for the grant of the privilege. In the letters issued by the Government and the Commissioner, such requirement has been reiterated in no uncertain term. The power to be exercised under Rule 3 and the power to grant licence have been vested with high and responsible officers. In such view of the matter, it is not possible to accept the contention that Rule 3 and the subsequent letters are vitiated.

11. It is further contended that the respondents have given direction for allotment of 1500 shops on the basis of nomination even though about 2364 shops have remained unallotted. It has been contended that by limiting the number to 1500, the respondents have kept the door ajar for arbitrariness to sneak in and it is very likely that the authorities may select locations for establishing such new shops with a view to harass such of those existing IMFL shop vendors who are not to the liking of the officers concerned. Such a general allegation is very far-fetched and difficult to accept. There is no presumption that any officer of the Government and that too highly placed officer is prone to exercise his power arbitrarily in a malafide manner. If any particular officer misuses his power or position, the action taken by him can be challenged before appropriate forum in an appropriate manner. However, the mere remote possibility of such abuse is not sufficient to vitiate the two letters issued by the respondents. Moreover, as has been submitted by the learned Additional Advocate General representing the State, even the number of applications, which have been received for grant of privilege on the basis of nomination, is far below the stipulated number of 1500.

12. The next contention is to the effect that the Co-operative Societies are not instrumentalities of the State and no preference could have been given. Moreover, the bye-laws of the Co-operative Societies would not permit the carrying of business in the matter relating to

sale of liquor. There is no doubt that it has been held by the Full Bench of this Court in 2001 WLR 1 (M. THANIGACHALAM v. MADHURANTHAGAM AGRICULTURAL PRODUCERS CO-OPERATIVE MARKETING SOCIETY LIMITED AND OTHERS) that for the purpose of Article 12 or even 226 of the Constitution, a Co-operative Society as such cannot be considered as instrumentality of the State. This, however, does not mean that no provision can be made giving preference to Co-operative Societies in the matter relating to undertaking of any work or business. For instance, under Section 20-B of the Act, a specific provision has been made for giving preference to the Co-operative Societies in the matter relating to grant of licence under clause (d) of section 20. Moreover, the validity of Rule 3 proviso has been upheld in several decisions of this Court such as the judgment dated 24.12.1996 in W.P.No.9170 of 1996 and, the decision dated 24.7.2002 in W.A.No.2209 of 2002, and the decision reported in 1991 WLR 275 (GOVINDASWAMY v. STATE OF TAMIL NADU REP. BY THE SPECIAL COMMISSIONER AND SECRETARY TO GOVERNMENT, HOME PROHIBITION AND EXCISE DEPARTMENT, FORT ST. GEORGE, MADRAS .

13. It has been next contended that under Rule 3 power has been vested with the Commissioner to direct the licensing authority to grant licence to the Corporation, Co-operative Society, etc. by nomination and the Government had no jurisdiction to curtail such discretionary power of the Commissioner by issuing any direction. In this context relying upon the decision reported in A.I.R. 1969 SC 634 (STATE OF GUJARAT v. SHANTILAL MANGALDAS AND OTHERS) it has been contended that when a statute provides a particular manner of exercising power, such jurisdiction must be exercised in the manner prescribed or not at all.

14. Even assuming that it is the exclusive power of the Commissioner to give directions, the mere fact that the Government has issued a letter to the Commissioner would not vitiate the exercise of power by the Commissioner. It has to be remembered that the power conferred under Rule 3 is essentially an administrative power and not a judicial or quasi-judicial power. Law is well-settled that the State Government has right to deal the privilege in liquor business. Keeping in view the utmost benefit to the Government various provisions have been made in that regard. In such view of the matter, issuance of any policy direction by the Government from time to time advising its officers to act in a particular manner cannot be said to be ipso facto illegal or without any jurisdiction unless such instruction contravenes any of the provisions of the Statute or the Rules. The contention to the effect that the State Government has usurped the power of the Commissioner by issuing "the Guidelines" as per letter dated 1.2.2003 or the Commissioner has abdicated his function under Rule 3 is not untenable.

15. It has been contended that application for grant of privilege on the basis of nomination as envisaged in Rule 3 proviso has to be made in Form VI, which is also envisaged in Rule 13. Rule 13(1)(i) contemplates that the applicant is required to submit a demand draft for an amount equivalent to one half of the privilege amount fixed for the shop. Rule 13(4) contemplates that the selected applicant is required to remit the remaining one half of the privilege amount and the licence fee on the date of

intimation itself and under Rule 13(5) if the selected applicant fails to remit the amount, the amount paid under Rule 13(1)(i) is to be forfeited and the shop is to be renotified for grant of privilege. It is contended that in view of these mandatory provisions contained in the statutory rules, neither the Government nor the Commissioner of Excise has any discretion to permit any co-operative society to pay the privilege amount in instalments and as per the provisions contained in Rule 13 payment of the entire amount is a condition precedent for grant of licence under Rule 13(8).

16. The aforesaid submission made on behalf of the learned counsel for various petitioners has been combated by the learned Additional Advocate General by submitting that even though under Rule 3 proviso application is to be made under Form-VI, the other provisions contained in Rule 13 are not ipso facto applicable. It has been further submitted that under the proviso, the Commissioner has power to fix payment of sum or fee or both which may be even less than the amount required to be paid by the individual applicants. Since the Commissioner has discretion to fix payment of lesser amount, by necessary implication it must be held that he has discretion to permit the Cooperative Societies to make payment in instalments. It has been further stated that even if the Co-operative Societies are required to file their application in Form VI together with affidavit in Form II, there is no specific requirement regarding compliance with other conditions indicated in Rule 13-A. It is his submission that so far as the grant of privilege by nomination as envisaged in Rule 3 proviso is concerned, Rule 13 is not applicable. These rival submissions require careful consideration.

17. Section 17-C enables the State Government to grant the privilege of selling by retail Indian made foreign spirits within any local area and sub-section (2) provides that no grantee of privilege shall exercise the same until the licence in that behalf has been received by him from the prescribed authority. Section 17-D empowers the State Government to levy a sum or fee or both in consideration of the grant of any privilege under Section 17-C and also a fee on licences granted under Section 17-C. Section 54(1) empowers the State Government to make the rules for the purpose of carrying into effect the provisions of the Act. In exercise of such power, the Tamil Nadu Liquor (Retail Vending) Rules, 1989 have been framed. Rule 3 prescribes that the privilege shall be granted to any person in accordance with the provisions of the Rules. The first proviso empowers the Commissioner to direct the licensing authority to grant privilege of retail vending to the Tamil Nadu State Marketing Corporation or the Tamil Nadu Civil Supplies Corporation or the Co-operative Societies. It is however made clear under the Proviso that such grant of privilege on the basis of nomination to the Tamil Nadu State Marketing Corporation or the Tamil Nadu Civil Supplies Corporation or the Co-operative Societies shall not exceed Forty percent of the maximum number of retail vending shops. Under the said proviso, the Commissioner is also empowered to fix the sum or fee or both on payment of which such privilege is to be granted. On receipt of such direction from the Commissioner, the licensing authority is to issue the grant by nominating the concerned Corporation or the Society. However, the Society or the Corporation is required to apply to the licensing authority in Form VI and the licensing

authority before nominating any co-operative society is obliged to cause such verification as deemed necessary to satisfy itself the suitability of that society for the grant of the privilege.

Apart from this specific provision regarding grant of privilege on the basis of nomination, the general provision relating to grant of privilege is laid down in Rule 13. Under Rule 13(1)(i), any person interested in getting the privilege, is required to make an application in Form VI and along with such application, he is required to submit a demand draft for the amount equivalent to one half of the privilege amount. Under Rule 13(2), if the number of eligible application does not exceed the number of shops notified for an area, the applicant or applicants shall be selected for grant of privilege. Where, however, the number of applications exceeds the number of shops, selection shall be done by drawal of lot. Under Rule 13(3), the Collector is required to renotify the vacant shops in the particular notified area if number of applications received is less than number of shops. Under Rule 13(4), the selected applicant is to be intimated in writing and he is required to remit the remaining half of the privilege amount and licence fee of Rs.5,000/- on the very same day and if he fails to do so, under sub-rule (5) the privilege amount, that is to say, half of the amount paid under sub-rule (1) is to be forfeited to the Government and the shop is to be renotified. Where an applicant is not selected, the half of the privilege amount paid under sub-rule (1) is to be returned to him. After being selected and after making necessary payment as contemplated under Rule 13(4), the applicant is required to select a suitable building and to apply in Form VI-A and thereafter the licensing authority is to grant licence in Form VII within three days from the date of receipt of the application. It is to be noticed that it is always open to a Co-operative Society to file any application for the grant of privilege on the basis of draw of lots under the procedure contemplated under Rule 13. It goes without saying that when the application is filed under Rule 13, the Co-operative Society is to comply with all the requirements contemplated under Rule 13.

Rule 3 Proviso, however, contemplates a different method of selection. Even though under Rule 3 proviso an application in Form VI is contemplated, there is no specific requirement under such proviso that the payment as required under Rule 13(1)(i) is to be made nor there is any specific requirement of payment of balance amount contemplated in Rule 4. On the other hand the procedure relating to grant of licence in respect of the shops decided to be settled under Rule 3 proviso has been laid down under Rule 13A. This provision lays down that upon the nomination under Rule 3 proviso, the nominee is required to remit the application fee of Rs.500/-, the sum or fee or both fixed by the Commissioner, the licence fee of Rs.5,000/- and security deposit of Rs.1,00,000/-. Since a specific procedure has been contemplated under Rule 3 proviso read with 13-A, the general provision prescribed under Rule 13 to that extent is inapplicable. It is of course true that application under Rule 3 proviso has to be made in Form VI. However, the requirement regarding deposit of half of the privilege amount at the time of making application is a requirement under Rule 13(1)(i). Form VI, even though is stated under Rule 13, is also applicable to the application under Rule 3. The information sought for in Column-4 in Form VI as to whether the applicant has remitted half of the privilege fee is merely intended to be an information to be supplied for the purpose of processing. The mandatory requirement

regarding deposit of half of the privilege amount is a specific requirement under Rule 13(1)(ii), but there is no specific requirement under Rule 3 (Proviso). Under Rule 3 proviso, the Commissioner is authorised to fix the sum or fee or both. While fixing payment of sum or fee or both, the Commissioner is not obliged to give a direction that the entire amount or half the amount is required to be paid at the time of application. Obviously while fixing the sum or fee or both to be payable, the Commissioner in the absence of any other embargo can give a direction for making payment of such amount in suitable instalments. The requirement regarding payment of the privilege amount, 50% at the time of making the application and 50% at the time of receipt of intimation regarding selection as contemplated under Rule 13(1)(i) and 13(4) is not a condition precedent for grant of privilege on the basis of nomination as contemplated in Rule 3 proviso read with 13-A. By issuing such a direction and permitting the Co-operative Societies to make the payment in seven instalments, cannot be said that the State Government or the Commissioner have violated any specific provision of the Act or the Rules.

18. Learned counsels appearing for the petitioners have contended that even though no person has got a fundamental right to carry on business of vending liquor under Article 19 of the Constitution, once the State decides to grant such privilege of vending liquor to the persons, the State cannot discriminate between the two sets of vendors. For the aforesaid purpose, the learned counsels have placed reliance upon the decision of the Supreme Court reported in A.I.R. 1996 SC 911 (M/s. KHODAY DISTELLERIES LIMITED v. STATE OF KARNATAKA AND OTHERS). It has been submitted that even assuming that the respondents had the authority to settle the vacant shops on the Co-operative Societies, by permitting the Co-operative Societies to pay the amount in instalments, the respondents have discriminated between the other regular applicants on the one hand and the Co-operative Societies on the other hand. It has been further submitted that once the Co-operative Societies take upon themselves the obligation to vend liquor, such Cooperative Societies must compete with the individuals on the same level playing field and it is not open to the State Government or the Commissioner make it easier to the Co-operative Societies to carry on the business by showing concessions regarding payment of amount in instalments and other concessions. It had been submitted that even though Article 19 is not attracted, the action of the respondents is hit by the principles of equality as contemplated under Article 14 of the Constitution.

19. There is no doubt that even an administrative action or an executive action can be challenged on the ground of discrimination being violative of principles of equality as enshrined in Article 14 of the Constitution. Law is well settled that Article 14 forbids class legislation, but it does not forbid reasonable classification. What is forbidden is discrimination. If persons are similarly situated, such persons must be similarly treated. Where, however, the persons are not similarly situated, there is no prohibition to treat them separately, provided of course there is reasonable nexus between the basis of classification and object to be achieved.

20. In the present case, the respondents have treated the Cooperative Societies as a class apart from the individuals, who have been granted privilege. Rule 3 proviso itself contemplates that the Cooperative Societies can be treated as class apart. The validity of Rule 3 proviso has been already upheld in several decisions of this Court. That the Co-operative Societies can be considered as a class apart is well recognised and many specific and special provisions are made for the Co-operative Societies in many statutes.

In A.I.R. 1964 SC 980 (MOHMEDALLI AND OTHERS v. UNION OF INDI AND ANOTHER) the validity of the provisions contained in Employees' Provident Funds Act granting exemption to any establishment registered under the Co-operative Societies Act had been challenged as violative of Article 14 of the Constitution. It was observed :
" . . . Clause (a) of Section 16, s it now stands, has exempted establishments registered under the Co-operative Societies Act, because it is well known that it is the settled policy of the Government to foster co-operative societies with a view to their development and growth in the interest of the community. It is not necessary to cite instances where this Court has held that co-operative societies stand on a special footing which distinguishes them from other establishments and corporations." (emphasis added)

21. It has been contended that the object to be achieved is to generate more funds for the Government by settling "unsettled shops" and such a purpose cannot be achieved by giving concession to the Cooperative Societies. In the present case, the main concession given to the Co-operative Society is relating to the manner of payment and not the amount involved. On previous occasions, decision had been taken to settle such shops with the Co-operative Societies on payment of lesser amount and yet this Court had upheld such actions on several occasions. (See decision dated 24.12.1996 in W.P.No.9170 of 1996 and the Division Bench decision reported in 1997 WLR 814 (M.P. MARIAPPA NADAR & OTHERS v. STATE OF TAMIL NADU, REP. BY ITS SECRETARY TO GOVERNMENT, PROHIBITION AND EXCISE DEPARTMENT, FORT ST. GEORGE, CHENNAI 9 AND 10 OTHERS) and the decision reported in 2001 WLR 31 (S. PERIASAMY v. THE GOVERNMENT OF TAMIL NADU, REP. BY ITS SECRETARY TO GOVERNMENT, PROHIBITION AND EXCISE DEPARTMENT, CHENNAI AND 2 OTHERS)
In the present case, the Co-operative Societies are required to pay the same amount as fixed for other individual licensees (of course since they are to operate for lesser period, they are asked to pay the proportionate amount). The only concession is regarding payment of such amount in instalments and providing certain credit facilities or incentives to the Co-operative Societies. Judicial notice can be taken of the fact that so far as the financial capability is concerned; the Co-operative Societies cannot be expected to be at par with the individuals. By very nature of things, the Co-operative Society is bound by its bye-laws, rules and procedures. Keeping in view the fact that many of the shops could not be settled in normal process contemplated under Rule 13 in spite of several attempts, the State Government and the Commissioner wanted to garner more funds by trying to settle such vacant shops on the basis of nomination with Co-operative Societies. By providing for credit facilities and payment by instalments, the respondents

have only tried to make it easier for the Cooperative Societies to run the shops. The object of collecting more revenue is sought to be achieved by treating the Co-operative Societies on a slightly different footing. (It is another matter that many Cooperative Societies have defaulted in the past in making payment and such disappointing experience may also be repeated in future).

22. It is to be noticed that if, at the inception the Commissioner would have taken a decision to settle 40% of the shops with the Cooperative Societies under Rule 3 proviso, no exception could have been taken by the petitioners in view of the decisions already noticed upholding the validity of Rule 3. It is not their case and nor it can ever be countenanced that such petitioners had given their offers only because they knew that about one third of the shops would not be settled with any persons and would remain vacant. If the respondents could have exercised such power at the inception, without any demur, there is no rhyme or reason to contend that the respondents cannot take any steps subsequently to settle such vacant shops in accordance with Rule 3 proviso.

23. Learned counsels for the petitioners have also contended that by permitting the Co-operative Society to pay the security deposit in instalments, the respondents have violated the specific provisions contained in Rule 13-A(d). Rule 13-A(d) specifically provides that a security deposit of Rs.1,00,000/- is required to be made. There is no power conferred on the Commissioner to relax such a statutory requirement prescribed under the Rules. To this extent, the direction contained in the Commissioner's letter dated 4.2.2003 must be taken to be contrary to the rules and is required to be quashed. In other words, before obtaining licence, the concerned co-operative society is required to make necessary security deposit. As a matter of fact the learned Additional Advocate General appearing for the State has fairly conceded that no such provision had been made in the guideline prescribed by the Government and the Commissioner's direction to this extent cannot be sustained.

24. It has been submitted that by permitting the Co-operative Societies to pay the amount in instalments, the respondents are violating the provisions contained in Rules 19, 23 and 24. It has been submitted that in case the licence granted to a co-operative society is cancelled or suspended under Rule 19, such a co-operative society thereafter would not be liable to pay the instalments. Similarly when the shop is closed under the direction of the Collector under Rule 23, the co-operative society may not pay any further instalments. Learned Additional Advocate General has clarified ,and in my opinion rightly , that notwithstanding the subsequent cancellation or suspension of the licence under Rule 19 or closure of the shop under Rule 23, the liability to pay the entire sum fixed would remain and the Cooperative Society is obliged to pay the entire sum. He has submitted that only payment schedule is deferred but the liability to pay the entire amount remains irrespective of the action taken under Rule 19 or 23. In view of the submission made by the learned Additional Advocate General, the apprehension expressed by the learned counsel for the petitioners must be taken to be unfounded.

25. Learned counsels for the petitioners have contended that under the impugned communications of the State Government and the Commissioner, the Co-operative Societies after are permitted to seek for shifting of the shops which is discriminatory and against the Rules. There cannot be any doubt that under Rule 4(3) the Collector is required to determine the number of shops in the area notified and under Rule 4(3) proviso, the Collector is empowered (of course with the permission of the Government) to increase or decrease the number of shops in the area taking into account the subsequent need and the prevailing conditions including demand in the area. The guidelines only indicate that the Co-operative Societies may seek for change, but there cannot be any doubt that the question of shifting a shop is to be considered in accordance with the provisions contained in Rule 17. Similarly the question of increasing or reducing the number of shops is required to be decided in accordance with Rule 4(3)(proviso).

26. It has been specifically contended that a new area has been notified which was not included earlier and thereby the business of the petitioners is likely to be adversely affected. In the decision dated 3.12.2001 in W.P.No.21835 of 2001, it has been specifically held that under Rule 4(3) the Collector is empowered to notify the new area and similarly the Collector is empowered to increase or reduce the number of shops and merely on account of such notification of new area or increase of shops, the existing retail vendors cannot have cause of action to challenge such action of the Collector. Such decision has been subsequently upheld by the Division Bench in the decision reported in 2002 (I) MLJ 627 (R. SELVARAJ & OTHERS v. GOVERNMENT OF TAMIL NADU, REP. BY ITS SECRETARY, PROHIBITION & EXCISE DEPARTMNT, FORT ST. GEORGE, CHENNAI AND OTHERS). The contention challenging the instruction regarding relocation cannot be accepted in view of such decisions.

27. It has been contended that the enabling provision contained in Rule 3 proviso regarding grant of right by nomination should have been exercised before the grant of licence to the individuals and once all the shops were decided to be settled by following the procedure under Rule 13, there was no scope for exercising such a power after most of the shops have been settled with individuals by following the procedure under Rule 13. Such a contention ignores the specific provision contained in the proviso, where under it is provided that the Commissioner may direct the licensing authority to grant privilege in relation to retail vending shops not exceeding 40% of the maximum number, including the shops for which eligible applications have not been received. This emphasised expression makes it clear that even after some shops have been sold or settled under Rule 13, the Commissioner may direct the licensing authority to take steps for settlement of remaining shops which have not been settled with anybody under Rule 13.

28. A contention has been raised to the effect that the letter dated 1.2.2003 issued by the Secretary to the Government cannot be treated as prior approval of the Government. His contention that before issuing any direction under the proviso, the Commissioner is required to have the prior permission of the Government and such a permission can be granted

only by issuing orders in accordance with Article 166 of the Constitution of India. In the writ petition itself, the ground of attack seems to be to the effect that the letter dated 1.2.2003 issued by the Secretary to the Government cannot be treated as prior approval of the Government and the specific objection regarding noncompliance with Article 166 of the Constitution of India does not appear to have been specifically raised in W.P.No.4744 of 2003. Be that as it may, even though the order issued by the Secretary is not expressed to be an order by the Governor in the form required under Article 166, the file produced by the Additional Advocate General indicates that in fact the concerned Minister has passed the order. Moreover on a careful perusal of Rule 3 proviso, I do not find any specific requirement that such a direction can be taken by the Commissioner only after obtaining the prior permission of the Government. It is true that in the decision reported in 2000(4) CTC 365 it has been indicated that prior approval of the Government is necessary. However, that decision was in the context of third proviso, which was part of the Rule at the relevant time but has been subsequently deleted.

29. It has been further submitted that on previous occasions when the Government /Commissioner has decided to settle the shops on nomination basis with the Co-operative Societies, payment by instalments had not been permitted by the Government and therefore, there is no justification for the Government /Commissioner to permit payment by instalments. Once it is held that Rule 3 proviso and Rule 13-A do not specifically require payment of the amount as a condition precedent for grant of licence, the Government, which is to receive the money or the Commissioner who has to decide the matter, can permit payment by instalments. The mere fact that on previous occasions the Government/Commissioner have not permitted payment by instalments is not sufficient to hold that they have no such power.

30. Learned counsel has also contended that under Section 20-A before considering the application for grant of licence or permit, the licensing authority is required to consider the suitability of the applicant and as per the Explanation while considering the question of suitability, the authority is required to consider the solvency of the applicant. It has been submitted that the very fact that the Government/Commissioner have decided to permit the Co-operative Societies to pay by instalments would ipso facto indicate that such Cooperative Societies are not solvent enough to pay the entire amount at a time and as such there is violation of the provisions contained in Section 20-A of the Act. This submission is again without any substance. It is true that the licensing authority is required to consider the solvency of the applicant, but the opening words of Section 20-A themselves make it clear that such provision is subject to the provisions contained in Section 20-B where a preference is required to be given to the Co-operative Societies over every other applicant. The question of solvency is always a relative concept. By merely permitting a person to pay by instalments does not mean that the person or the institution is insolvent.

31. The learned Counsel, appearing for the petitioner in W.P.No.48 51 of 2003 has raised the contention that the petitioner in the aforesaid writ petition had been given licence in respect of a shop by paying

the privilege amount fixed by the Government for peripheral area and presently it is found that a Co-operative Society is being permitted to run a shop at a place within 500 metres from the shop of the petitioner at Nazarathpet Panchayat. It has been submitted that establishing a new shop in a place, which was not earlier notified and which is in close proximity of the shop of the petitioner, would cause immense loss to the petitioner and it is not contemplated. Such a submission even though attractive on the face of it, cannot be accepted in view of the decision of Justice K. Govindarajan in W.P.No.21835 of 2001 and other connected matters disposed of on 3.12.2001 which has been subsequently upheld in appeal by the decision reported in 2002(1) M.L.J. 627 (R. SELVARAJ & OTHERS v. GOVERNMENT OF TAMIL NADU, REP. BY ITS SECRETARY, PROHIBITION & EXCISE DEPARTMNT, FORT ST. GEORGE, CHENNAI AND OTHERS).

32. For the aforesaid reasons, the letters and the directions issued by the Government and the Commissioner are upheld. However, the condition contained in the letter of the Commissioner dated 4.2.2003 in paragraph 5(iii) providing collection of security deposit in instalments is found to be contrary to the Rules and therefore quashed. The writ petitions are accordingly allowed in part, subject to the aforesaid observations. All the interim orders stand vacated. No order as to costs. Connected Miscellaneous Petitions are closed.

Index : Yes
Internet : Yes
dpk

To

1. The Government of Tamilnadu
rep. by its Secretary,
Prohibition & Excise Department,
Fort St. George,
Chennai 600 009.

2. The Commissioner,
Prohibition & Excise Department,
Chepauk, Chennai 600 005.